Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03905/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 March 2020	**On 19 March 2020**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VK
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms S Jones, Senior Home Office Presenting Officer
For the Respondent: Ms A Childs, Counsel instructed by CK Solicitors

DECISION AND REASONS

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

1. Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

2. For the purposes of this decision I refer to VK as the appellant and to the Secretary of State as the respondent, reflecting their positions before the First-tier Tribunal.

3. This decision is a remaking of the Article 3 ECHR appeal originally brought by VK as part of his challenge to the refusal of his protection and human rights by the respondent on 4 June 2019.

4. The re-making of the Article 3 ECHR claim is required following my error of law decision issued on 15 January 2020 which found an error in the decision of First-tier Tribunal Woolf which had allowed the appeal on Article 3 medical grounds. As set out in the error of law decision in paragraphs 19, 21 and 22, the error of law and remaking was limited to the appellant's Article 3 medical claim.

5. The background to this matter is that the appellant is a citizen of Ukraine born in 1971. He came to the UK illegally in June 2016. He claimed asylum on 23 December 2018 after being encountered working on a building site. The appellant maintained that he was called up for military service in Ukraine between 1991 and 1993 and again in September 2014. On the latter occasion he was given a role as a driver and was injured when a tank fired at his military vehicle. He suffered some physical injuries from this attack and was affected psychologically. His military service came to an end in September 2015 but he remained in the operative reserves. He refused any further offers to re-join the military. He attempted to avoid confrontational situations with civilians who did not understand the difficulties for those who had served in the military. However, on approximately ten occasions he was attacked by Ukrainians who supported Russia in the conflict. Feeling that he was unable to remain in Ukraine and speak freely and also concerned that these attacks might escalate or that he might end up in prison for being involved in these fights, with the assistance of friends he left Ukraine.

6. The appellant also maintained that after coming to the UK in March 2018 he was informed by his nephew that a call-up notice had been issued requiring him to attend again for military service.

7. As above, the respondent refused the appellant's protection and human rights claims on 4 June 2019. The appellant appealed to the First-tier Tribunal and the decision of 20 September 2019, allowing the appeal on Article 3 medical grounds, followed. The error of law hearing before me was on 18 December 2019 and, as above, my error of law decision was issued on 15 January 2020.

8. There is no dispute here that the appellant suffers from post-traumatic stress disorder (PTSD) brought on by his service in the Ukrainian military and, in particular, an attack on his unit in 2014 in which the tank in which he was serving was blown up. He suffered head injuries and had to witness the death and suffering of others. The specific symptoms of this

condition were described in a psychology report dated 12 July 2019 of Dr Green, a clinical neuropsychologist which was considered in the error of law decision at paragraph 5.10.1:

> "VK has experienced a potentially life-threatening trauma and ongoing trauma during the rest of his time serving in the army during the war. As described above, he reported various symptoms that he has experienced or is experiencing, including poor sleep, nightmares, flashbacks, low mood, increased irritability, headaches, a heightened startled response, and various physiological anxiety responses. VK reported engaging in various avoidance behaviours to cope and resorting to using alcohol to help him manage with flashbacks and getting to sleep."

9. The correct approach to an Article 3 medical claim brought on the basis of a mental disorder is set out in the case of J v SSHD [2005] EWCA Civ 629. This case provides as follows in paragraphs 26 to 31:

> "26. First, the test requires an assessment to be made of the severity of the treatment which it is said that the applicant would suffer if removed. This must attain a minimum level of severity. The court has said on a number of occasions that the assessment of its severity depends on all the circumstances of the case. But the ill-treatment must 'necessarily be serious' such that it is 'an affront to fundamental humanitarian principles to remove an individual to a country where he is at risk of serious ill-treatment': see Ullah paras [38-39].
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> 27. Secondly, a causal link must be shown to exist between the act or threatened act of removal or expulsion and the inhuman treatment relied on as violating the applicant's Article 3 rights. Thus in Soering at para [91], the court said:
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> > 'In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which *has as a direct consequence the exposure of an individual to proscribed ill-treatment.'*(emphasis added).
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> See also para [108] of Vilvarajah where the court said that the examination of the Article 3 issue 'must focus on the foreseeable consequences of the removal of the applicants to Sri Lanka…'
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> 28. Thirdly, in the context of a foreign case, the Article 3 threshold is particularly high simply because it is a foreign case. And it is even higher where the alleged inhuman treatment is not the direct or indirect responsibility of the public authorities of the receiving state, but results from some naturally occurring illness, whether physical or mental. This is made clear in para [49] of *D* and para [40] of Bensaid.
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> 29. Fourthly, an Article 3 claim can in principle succeed in a suicide case (para [37] of Bensaid).
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> 30. Fifthly, in deciding whether there is a real risk of a breach of Article 3 in a suicide case, a question of importance is whether the applicant's fear

of ill-treatment in the receiving state upon which the risk of suicide is said to be based is objectively well-founded. If the fear is not well-founded, that will tend to weigh against there being a real risk that the removal will be in breach of Article 3.

31. Sixthly, a further question of considerable relevance is whether the removing and/or the receiving state has effective mechanisms to reduce the risk of suicide. If there are effective mechanisms, that too will weigh heavily against an applicant's claim that removal will violate his or her Article 3 rights."

10. The assessment of the appellant's Article 3 medical claim did not take place at the error of law hearing in order to allow the appellant to adduce any further material on which he wished to rely in support of that claim. He provided a supplementary bundle for the hearing on 5 March 2020 which included an addendum report from Dr Green dated 18 February 2020 and medical records from cognitive behavioural therapy sessions which have taken place between 22 November 2019 and 13 February 2020. The appellant also provided a letter from his GP dated 4 March 2020.

11. It is my conclusion, having considered all of the materials before me against the guidance in J, that the appellant cannot meet the first test set out in paragraph 26 for a minimum level of severity of the medical condition to be present. The case of **J** confirms the particularly stringent threshold in Article 3 medical cases provided in the case of N v SSHD [2005] UKHL 31. It was not submitted to me that the decision of the Grand Chamber of the European Court of Human Rights in Paposhvili v Belgium (41738/10) materially altered the threshold that the appellant here had to meet.

12. Nothing in the evidence indicated that at the time of the original trauma or at any time thereafter whilst he remained in Ukraine that the appellant had thoughts of self-harm or suicide. It is also undisputed that he did not present to any authority in the UK with mental health problems until he was detained and claimed asylum on 23 December 2018.

13. Further, it is also the appellant's case, understandably so, that he became particularly unwell during his period of detention in the UK in late 2018 and into 2019 and that his symptoms of PTSD increased during this period. However, even during this particularly difficult period, the medical records from the detention centre do not show that his health deteriorated to as to meet the threshold for an Article 3 medical claim. The medical records from the Heathrow Immigration Removal Centre are contained in pages 29 to 45 of the appellant's main bundle. On paragraph 30 the records indicate towards the final third of the page that he did not express ideas of self-harming or suicide, had not tried to harm himself and had not received medication for mental health problems.

14. The next significant piece of medical evidence is the first report of Dr Green which is dated 12 July 2019. In paragraph 5.35 the report states this:

> "5.3.5 With regards risk, [VK] was asked about whether he has any current suicidal ideation or thoughts about harming himself. He denied having any thoughts or intention to commit suicide or harm himself. [VK] mentioned that he had friends in the army who have committed suicide. He stated that he hoped that this would not be him one day."

15. Nothing further in this report shows any assessment of the risk of suicide or self-harm or any expression of any behaviour or thoughts or ideation from the appellant that might suggest that this was in any way a risk for him. In my view this also indicates that his claim cannot meet the minimum threshold for a finding of an Article 3 medical claim. The appellant's medical background and the information he gave to Dr Green did not support the statements in in paragraph 7.2.3 of Dr Green's report that if the appellant were faced with deportation to Ukraine "there is a risk of suicide" and that:

> "I am concerned that, were he faced with forced extradition to the Ukraine, [VK] is at significant risk of suicide. As stated above, he has avoided the Ukraine to the point of not being able to return home and see his children and I am, therefore concerned that he would damage himself severely if he were forced to return."

16. In his addendum report dated 18 February 2020, Dr Green refer to the specific psychological assessments that he carried at the time of the first report. He maintained that I was referred in particular to paragraphs 6.62 which reads as follows:

> "6.6.2 [VK] scored significantly high on the Anxiety (98), Somatoform (76), Dysthymia (93), Alcohol Dependence (77) and PTSD (91) Clinical Syndrome Scales, and the Thought Disorder (76) and Major Depression (86) Severe Clinical Syndrome Scales thus indicating the prominence of syndromes.
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> …
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> - Individuals who score highly on the Dysthymia scale tend to be socially withdrawn, pessimistic discouraged, and preoccupied with feelings of personal inadequacy. They have low self-esteem and are persistently sad. When symptoms appear, these can include poor appetite, suicidal ideation and problems in concentration.
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> …
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> - Individuals who score highly on the Major Depressive scale are severely depressed and may be unable to manage their day-to-day activities. Suicidal ideation may be present, and their underlying personality style is likely to be of the emotionally detached type, especially dependent or depressed."

32. In paragraph 4.4 of the addendum report, Dr Green refers to these findings and goes on to state:

> "Taken together, along with his presentation in clinical interview, uninformed (sic) the view that they (sic) risk of suicide could not be ruled out who (sic) would not be wisely left unaddressed in [VK] case. I continue to hold the belief, that [VK] would be at risk of suicide should an immigration tribunal recommend his return to the Ukraine. It may be that [VK] experiences a trauma shaped is current functioning such that he has maladapted coping with emotions leading to the elevations on concerning subscales that were observed upon the Million Clinical Multiaxial Inventory 3rd edition as reported in my substantive report and referred to above."

17. My difficulty in accepting this clarification is that the references in paragraph 6.6.2 of the first report to suicidal ideation is not to any symptoms, observed or reported, concerning VK but to features that <u>may</u> be present where an individual obtains the scores that VK did on the psychological tests that were used. They do not identify that VK has ever experienced suicidal ideation. The evidence shows consistently that he has not. Both of the references here to suicidal ideation are to the effect that this "may" be a symptom.

18. Further, in paragraph 4.5 of the addendum report, Dr Green states as follows:

> "I must stress a significant caveat here: I have not met with [VK] for the best part of a year and I therefore have no up to date information about his psychological functioning. If so instructed, I am in a position to meet with [VK] once more, to update my opinion. If such a meeting were to be sanctioned, it would afford me the opportunity to conduct further objective testing of specific risk of suicide and current state of clinical depression. This was not done at the time of my meeting him previously owing to time constraints and prioritisation of other testing that was necessary and relevant to my instructions at that point."

19. This paragraph indicates that there was no "objective testing of specific risk of suicide" in the previous report and that one had not been conducted since. This is a further factor indicating that the evidence does not show that the appellant's mental illness, serious and distressing though it may be, does not meet the high threshold required for an Article 3 medical case to be made out.

20. Further, the appellant has provided the notes from his cognitive behavioural therapy sessions from November 2019 to February 2020. These notes are contained in the appellant's supplementary bundle on pages U7 to U11. The first session with the therapist is set out on page U11 and indicates in the third, fourth, fifth and sixth entries that the appellant is not a risk to himself, to others or from others, that he has not self-harmed and that he has no plans or intentions to do so. The notes also identify a protective factor, his daughter who is in the Ukraine. The most recent evidence on the appellant's mental state therefore also do not support his claim to be at risk of self-harm or suicide. Page U11 also shows that the appellant told the therapist what he told Dr Green, that he knows others "in the army who committed suicide. He hoped that this would not be him one day". I am not able to read this as an indication that he has

ever had ideas of self-harm or suicide either in the Ukraine or in the UK, certainly not to the extent that it supports an Article 3 ECHR medical claim.

21. The appellant also provided a letter from his GP dated 4 March 2020. This letter confirms what the reports of Dr Green and the notes from the detention centre and therapy sessions indicate, that he suffers from anxiety with depression and post-traumatic stress disorder. He has been prescribed Mirtazapine and it was not argued before me that this medication or a suitable alternative would not be available to him in Ukraine.

22. It was suggested for the appellant that his presentation in the UK could not be taken as an indication of how he would deteriorate if he returned to Ukraine, the location where he experienced the traumatic events that led to his mental illness and where he had a subjective fear for his safety and of being called up to the military again. I accept that life in Ukraine will be harder for the appellant for these reasons and that his health may deteriorate. As above, however, even when he was still living there and when at his worst in the UK when he was in detention, nothing in the evidence shows that he ever had thoughts of self-harm or suicide.

23. It is therefore my conclusion that the appellant's subjective fears of what he will experience on return to Ukraine are not sufficient to show a risk of self-harm or suicide that approaches the threshold required for a positive finding under Article 3 ECHR. Where that is so, the Article 8 ECHR claim must be refused.

Notice of Decision

24. The decision of the First-tier Tribunal under Article 3 ECHR was set aside to be remade.

25. The appeal under Article 3 ECHR is refused.

Signed:  Date: 11 March 2020

Upper Tribunal Judge Pitt